

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

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Case No. 4:05-CV-329-GKF-PJC

**STATE OF OKLAHOMA’S REPLY IN FURTHER SUPPORT OF ITS MOTION
IN *LIMINE* TO PRECLUDE DEFENDANTS FROM MAKING CERTAIN
CATEGORIES OF REFERENCES TO ITS PRIVATE COUNSEL [DKT. #2418]**

Plaintiff, the State of Oklahoma (“the State”), hereby submits its reply in further support of its Motion *in Limine* to Preclude Defendants from Making Certain Categories of References to Its Private Counsel (“State’s Mot.”) (Dkt. #2418) and in response to Defendants’¹ memorandum in opposition to the same (“Defs.’ Opp.”) (Dkt. #2497).

I. INTRODUCTION

As set forth below, Defendants’ Opposition is baseless. An attorney’s motive for taking any case — be it personal conviction, interest in the issues, compensation, or a combination of factors — is patently irrelevant to the merits of the case. It is apparent that the sole purpose of Defendants’ Opposition is to attempt to taint the Court’s impression of the Attorney General and the private attorneys working under his direction. This is a wholly improper tactic, and one that the Court should not countenance. Defendants’ arguments do not belong in a pleading, and

¹ The Cargill Defendants did not join Defendants’ Opposition and, instead, filed a separate response indicating that they do *not* oppose the State’s Motion but expect that the State’s attorneys will refrain from “the same type of references to Defendants and their counsel to which [the State] object[s] in [its] present motion.” (See Dkt. #2487.) The State does not seek to impose a double standard, and it and its attorneys pledge to adhere to the standards advanced in the State’s Motion in the event that the Court grants the State’s Motion.

certainly not before a jury. *See* LCvR 83.8(e) (directing that lawyers treat each other and the opposing party with courtesy and civility and conduct themselves in a professional manner).

II. ARGUMENT

A. While the State Has Not and Does Not Intend to Appeal to Regional Bias, It Is Apparent That an Order *in Limine* Precluding Defendants from Doing So Is Necessary

Defendants agree that “attempting to influence the jury through regional bias is improper” (Defs.’ Opp. at 2), but insist that “if the State is going to continue to refer to Defendants and their counsel as the ‘out-of-state corporate polluters’ then the Defendants are entitled to rebut those statements with the fact that many of the State’s attorneys are also from out-of-state.” (Defs.’ Opp. at 2-3.) Defendants’ unfounded attribution of this comment to the State is the first of several representations made by Defendants without citation to the record. Regardless, the State has not and does not intend to refer to the fact that many of Defendants’ attorneys are not from Oklahoma. Likewise, the State has not and does not intend to appeal to regional bias by improperly emphasizing the fact that Defendants are from outside of Oklahoma.

To the extent, however, that *Defendants’* geographic location is a *relevant* fact in this case (e.g., some of Defendants’ poultry operations, contract growers and land application sites are located in the Arkansas portion of the IRW), and given that the central issue here is whether Defendants are “polluting Oklahoma’s waters” (*see* Defs.’ Opp. at 2), the State reserves its right to introduce that relevant evidence at trial. Moreover, it should go without saying that Defendants’ comparison of the location of *parties* with the location of their *attorneys* has no basis. Whereas the geographic location of Defendants’ operations is of obvious relevance here, the geographic location of the State’s counsel has absolutely no relevance to any issue in this case. Thus, it is ripe for an *in limine* order categorically precluding any reference to the same.

B. Defendants' Effort to Divert Attention from Their Pollution of the IRW with Spurious and Irrelevant Accusations Against the State's Attorneys Is Improper

Defendants next contend that evidence concerning the history and the nature of the relationship between the State's private counsel and the State is relevant to the issues of bias, prejudice, and the motivation for filing this lawsuit. (Defs.' Opp. at 3.) Rehashing arguments presented in their Motion for Judgment as a Matter of Law (based on the State's retainer agreement with private counsel) (Dkt. #1064) — which the Court *denied* (Dkt. #1187) — Defendants assert that the fact that the State's lawyers are not state employees is probative of whether the State has acted for the common good by instituting this action. Specifically, Defendants contend that “Defendants are entitled to reveal the truth of the situation which is that private attorneys whose own personal financial wealth is at stake . . . are the ones who are primarily prosecuting this case.” (Defs.' Opp. at 4.)

It is well-established that the Attorney General has the power to retain outside counsel to assist the office in the prosecution of civil claims on behalf of the State.² *See, e.g.*, 74 Okla. Stat. § 20i(A)(2). The decision to do so, however, is no more probative of the merits of the State's case than Defendants' choice of counsel is probative of the merits of Defendants' case. Moreover, Defendants' assertion that “private attorneys . . . are the ones who are primarily prosecuting this case” is utterly misleading. As the Court knows, the State's Contract for Legal Services expressly provides that the Attorney General shall have overall control and direction of the litigation, including but not limited to approval of staffing (*see generally* Dkt. #2418-6), and

² Defendants' disdain for this arrangement undoubtedly stems from the reality that, given its limited resources, the Office of the Attorney General would be understaffed and underfunded to hold Defendants accountable for their actions without the services of additional private attorneys. *See, e.g., Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000) (describing environmental litigation as “tremendously complex, lengthy, and expensive”).

the State represents that the Attorney General and his office have duly exercised that level of control. Consistent with his duties and authority, it is the Attorney General who continues to prosecute this action to protect the interests of the State, including the State's interest in a clean, healthy, and safe environment. (*See* Dkt. #2406 (State's Motion *in Limine* To Preclude Defendants from Referring To This Action as Anything Other Than "The State's" Lawsuit); Dkt. #2586 (reply brief regarding same filed September 4, 2009).)

Quoting *Berger v. United States*, 295 U.S. 78 (1935), in which the issue was whether a U.S. attorney had committed prosecutorial misconduct in a criminal case, Defendants further suggest that the State's use of private attorneys is antithetical to the proposition that the State's "obligation to govern impartially is as compelling as its obligation to govern at all; and [its] interest, therefore . . . is not that it shall win a case, but that justice shall be done.'" (Defs.' Opp. at 3 (quoting 295 U.S. at 88).) The remainder of the paragraph from which Defendants quote confirms the State's adherence to the standard articulated in *Berger*. The remainder of that paragraph provides:

[The U.S. Attorney] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. *He may prosecute with earnestness and vigor* — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is at much his duty to refrain from *improper methods* calculated to produce a wrongful conviction as it is to use *every legitimate means* to bring about a just one.

295 U.S. at 88 (emphases added). Defendants have not alleged — and have no basis upon which even to suggest — that the Attorney General has struck foul blows or employed improper methods. Moreover, this Court already has held that the use of private attorneys — including on a contingent-fee basis — is a legitimate means to bring about justice in this case. Indeed, given that the Office of the Attorney General would be understaffed and underfunded to hold

Defendants accountable for polluting the IRW without the services of additional private attorneys, *see supra* note 2, *Berger* actually supports the use of private attorneys in this case. *See Berger*, 295 U.S. at 88 (articulating “duty . . . to use *every legitimate means*”).

As for the *motives* of the Attorney General, his client and outside counsel, the Court should not countenance Defendants’ unfounded attacks.³ They are, “like all ad hominem arguments, quite irrelevant.” *E.g.*, *People ex rel. Lockyer v. Brar*, 9 Cal. Rptr. 3d 844, 847 (Cal. Ct. App. 2004); *Smith v. Wal-Mart Stores East, L.P.*, No. 5:05-224, 2006 WL 2644963, at *3 (E.D. Ky. Sept. 14, 2006) (excluding “irrelevant statements regarding the motives of Plaintiff’s . . . counsel”); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 586 (S.D.N.Y. 1984) (“motives are irrelevant to the question whether, having brought the suit, [plaintiff] can . . . maintain it”).

Regardless, the suggestion that this lawsuit was brought with any ulterior motives is patently false. This is the State’s lawsuit, and any effort to suggest otherwise, directly or indirectly, is improper. (*See* Dkt. #2406 (State’s Motion *in Limine* to Preclude Defendants from Referring to This Action as Anything Other Than “The State’s” Lawsuit); Dkt. #2586 (reply brief regarding same).) And the desire to return the IRW to the condition that Oklahomans enjoyed before Defendants polluted the waters is entirely consistent with the purpose of the environmental laws at issue in this case. Thus, it is hardly improper for the State and its attorneys to articulate that purpose and to ask the jury to hold Defendants accountable for their conduct. (*See* Defs.’ Opp. at 4.)

³ Among other things, Defendants assert that they are entitled to argue “that private attorneys whose own personal financial wealth is at stake . . . are the ones who are primarily prosecuting this case,” that the State’s lawsuit is motivated by “money and politics,” and that the State and its attorneys have portrayed “pretend self-righteous indignation.” (Defs.’ Opp. at 4.) By Defendants’ logic, the State should be permitted to argue to the jury that Defendants’ attorneys had every financial incentive to discourage settlement and to take an unmeritorious defense to trial in order to maximize their hourly fees. The State obviously does not intend to pursue such a tactic, and Defendants should not be permitted to either.

Defendants' argument to the contrary is based upon their misplaced reliance upon *Resource Associates Grant Writing and Evaluation Services, LLC v. Maberry*, No. CIV 08-0552, 2009 WL 1255367 (D.N.M. Apr. 28, 2009), and *Richardson v. Rutherford*, 787 P.2d 414 (N.M. 1990). Although Defendants cite to these cases for the proposition that evidence concerning the motive for filing a lawsuit is admissible (Defs.' Opp. at 5), both involved state law claims for *malicious abuse of process*, a cause of action for which motive is an element.⁴ Defendants have lodged no claim for abuse of process here, and their aspersion that the State and its attorneys have pursued this action without proper motive lacks any basis and is outrageous. *See* LCvR 83.8(e) (directing that lawyers treat each other and the opposing party with courtesy and civility and conduct themselves in a professional manner).

Finally, Defendants attempt to make hay of the fact that certain of the State's private attorneys — though not all, notwithstanding Defendants' suggestion to the contrary — previously represented the State in litigation against the tobacco industry and have donated to the Attorney General's political campaigns.⁵ (Defs.' Opp. at 5.) At most, the fact that the State twice has hired the same law firms is probative of the conclusion that they do good work.⁶ Indeed, the State evaluated responses to its RFP for legal services on the bases of "experience,

⁴ Specifically, the elements of malicious abuse of process are: (1) commencing suit *without probable cause* or engaging in procedural improprieties; and (2) doing so with an improper motive. *See, e.g., Resource Assocs.*, 2009 WL 1255367, at *1.

⁵ Apparently contending that the State has "opened the door," so to speak, Defendants overstate and refer out of context to a single remark by counsel for the State regarding the tobacco industry. (Defs.' Opp. at 5.) Counsel's statement was not based upon his prior representation of the State in the tobacco litigation but rather on the common knowledge that the tobacco industry denied the addictiveness of cigarettes in the face of overwhelming and incontrovertible evidence.

⁶ Significantly, counsel for the Tyson Defendants, Kutak Rock LLP, has been the beneficiary of a number of contingency fee contracts with the State. (*See* Dkt. #1085 at 5 n.5 & Ex. 8.)

qualifications, adequacy of staffing, reasonableness of fee agreement, and financial condition.”

(*See* Dkt. #1085 at 3 & Ex. 3.) In short, counsel’s prior representation and political contributions have no bearing whatsoever on the merits of this lawsuit.

III. CONCLUSION

For the foregoing reasons and as set forth in the State’s Motion, the Court should preclude Defendants from making references in, without limitation, voir dire, direct examination, cross-examination and argument to the facts that:

- (1) certain of the State’s private counsel are from out-of-state;
- (2) the State’s private counsel are not State employees;
- (3) the State’s private counsel have been retained under a contingency fee contract;
- (4) if the State prevails, the State’s private counsel may be paid in whole or in part from the State’s recovery or by Defendants;
- (5) the State’s private counsel have advanced the costs of this litigation (including the costs of retaining expert witnesses);
- (6) certain of the State’s counsel previously represented the State in its lawsuit against the tobacco industry; and
- (7) certain of the State’s counsel have made contributions to political campaigns.

Respectfully Submitted,

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